

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

|                                 |   |                        |
|---------------------------------|---|------------------------|
| WESTERN WATERSHEDS PROJECT,     | ) |                        |
|                                 | ) |                        |
| Plaintiff,                      | ) | 03:06-CV-00527-LRH-RAM |
|                                 | ) |                        |
| v.                              | ) |                        |
|                                 | ) | <u>ORDER</u>           |
| BUREAU OF LAND MANAGEMENT AND   | ) |                        |
| U.S. FISH AND WILDLIFE SERVICE, | ) |                        |
|                                 | ) |                        |
| Defendants.                     | ) |                        |
| _____                           | ) |                        |

Presently before the court is Plaintiff Western Watersheds Project's ("Western Watersheds") Motion for Temporary Restraining Order and /or Preliminary Injunction (# 6<sup>1</sup>). Defendants Bureau of Land Management and U.S. Fish and Wildlife Service ("Defendants") have filed an opposition.

Plaintiff Western Watersheds is a non-profit membership organization that is seeking to prevent the Defendants from implementing certain activities in the Spruce Mountain area of Elko County, Nevada. Western Watersheds argues that an injunction is necessary to prevent the Bureau of Land Management ("BLM") from eradicating hundreds of acres of native pinyon-juniper and sagebrush vegetation by chaining and prescribed burning. BLM authorized this vegetation eradication project pursuant to the Spruce Mountain Restoration Project. BLM opposes the

---

<sup>1</sup>Refers to the court's docket number.

1 issuance of an injunction and characterizes the Spruce Mountain Restoration Project as a  
2 “hazardous fuels reduction project” that will prevent a future large-scale wildfire.

3       The Ninth Circuit uses two alternative tests to determine whether a preliminary injunction  
4 should issue. According to the “traditional test,” the equitable criteria for granting preliminary  
5 injunctive relief are: (1) a strong likelihood of success on the merits; (2) the possibility of  
6 irreparable injury to the plaintiffs if injunctive relief is not granted; (3) a balance of hardships  
7 favoring the plaintiffs; and (4) advancement of the public interest. *Textile Unlimited, Inc. v.*  
8 *A..BMH & Co., Inc.*, 240 F.3d 781, 786 (9th Cir.2001) (citing *Los Angeles Mem'l Coliseum*  
9 *Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1200 (9th Cir.1980)). In the alternative, the  
10 Ninth Circuit uses a “sliding scale” or balancing test where preliminary injunctive relief is  
11 available to a party who demonstrates either: (1) a combination of probable success on the merits  
12 and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of  
13 hardships tips in its favor. *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th  
14 Cir.2001) (citing *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 874 (9th  
15 Cir.2000)).

16       Here, Western Watersheds argues that BLM violated the National Environmental Policy  
17 Act (“NEPA”) by, among other things, failing to allow public review and comment on the Spruce  
18 Mountain Restoration Project environmental assessment (“EA”). In opposition, BLM argues that  
19 NEPA does not require public comment on draft EAs.

20       “NEPA is a statute that aims to promote environmentally sensitive governmental decision-  
21 making, without prescribing any substantive standards.” *Anderson v. Evans*, 314 F.3d 1006, 1016  
22 (9th Cir. 2002), *amended and superseded on other grounds by* 371 F.3d 475 (9th Cir. 2004) (citing  
23 *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989)). Pursuant to NEPA, a  
24 federal agency must prepare an Environmental Impact Statement (“EIS”) for all “proposals for  
25 legislation and other major Federal actions significantly affecting the quality of the human  
26

1 environment.” 42 U.S.C. § 4332(2)(C); *Klamath-Siskiyou Wildlands Center v. bureau of Land*  
2 *Mgmt.*, 387 F.3d 989, 993 (9th Cir. 2004). “An EIS is a thorough analysis of the potential  
3 environmental impact that ‘provide[s] full and fair discussion of significant environmental impacts  
4 . . . inform[s] decisionmakers and the public of the reasonable alternatives which would avoid or  
5 minimize adverse impacts or enhance the quality of the human environment.’” *Id.* (citing 40 C.F.R.  
6 § 1502.1).

7 As a preliminary step to preparing an EIS, “the agency may prepare an [EA] to determine  
8 whether the environmental impact of the proposed action is significant enough to warrant an EIS.  
9 *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 639 (9th Cir. 2004) (citing *Nat’l Parks &*  
10 *Conservation Ass’n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001)). “If the EA establishes that the  
11 agency’s action ‘may have a significant effect upon the environment’ then an EIS must be  
12 prepared.” *Id.*

13 In *Evans*, 314 F.3d at 1016, the Ninth Circuit, in *dicta*, interpreted NEPA regulations as  
14 requiring that the public “be given an opportunity to comment on draft EAs and EISs.” The Ninth  
15 Circuit revisited this issue in *Citizens for Better Forestry v. U.S. Dep’t of Agriculture*, and  
16 reiterated its earlier interpretation of NEPA regulations. 341 F.3d 961, 970 (9th Cir. 2003).  
17 However, the Ninth Circuit also noted that it had not “established a minimum level of public  
18 comment and participation required by the regulations governing the EA and FONSI [(finding of  
19 no significant impact)] process. . . .” *Id.* Although other circuits to address the issue have  
20 determined that public comment is not required on draft EAs, *Alliance to Protect Nantucket Sound,*  
21 *Inc. v. United States Dep’t of Army*, 398 F.3d 105, 115 (1st Cir. 2005); *Greater Yellowstone*  
22 *Coalition v. Flowers*, 359 F.3d 1257, 1279 (10th Cir. 2004), this court is bound to follow the Ninth  
23 Circuit. In this instance, the Ninth Circuit has indicated that NEPA requires agencies to provide  
24 some level of public comment on draft EAs.

25 In the case at bar, BLM did provide notice to the public, including Western Watersheds, of  
26

1 the Spruce Mountain Restoration Project approximately eight months prior to the final EA.  
2 Nevertheless, it is undisputed that BLM did not give the public an opportunity to comment on the  
3 draft EA prior to issuing its final decision. Therefore, in light of *Evans* and *Citizens for Better*  
4 *Forestry*, Western Watersheds has demonstrated the probability of success on the merits of its  
5 claim. In addition, the court finds that there is a significant possibility of irreparable harm to the  
6 environment if a preliminary injunction is not granted. Specifically, BLM will begin a process that  
7 will destroy native vegetation and result in the displacement and/or direct mortality of small  
8 mammals and birds in the project area. For the foregoing reasons, the court finds that a  
9 preliminary injunction should issue as Western Watersheds has demonstrated a combination of  
10 probable success on the merits and the possibility of irreparable harm.

11 IT IS THEREFORE ORDERED that Plaintiff Western Watersheds Project's Motion for  
12 Preliminary Injunction (# 6) is hereby GRANTED.

13 IT IS SO ORDERED.

14 DATED this 20<sup>th</sup> day of October, 2006.



15  
16  
17 LARRY R. HICKS  
18 UNITED STATES DISTRICT JUDGE  
19  
20  
21  
22  
23  
24  
25  
26